COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, JANUARY 21, 2003

PETITION OF

ROBERT WEINGARTEN,
GERRY R. GINSBERG,
and
LEONARD GUBAR,

CASE NO. INS-2001-00062

For Payment of Interest

FINAL ORDER

On May 13, 1991, the Circuit Court for the City of Richmond entered an order placing Fidelity Bankers Life Insurance Company ("Fidelity Bankers")[1] into receivership and appointing the State Corporation Commission ("Commission") as receiver. Thereafter, the Commission entered an order appointing Steven Foster, then Commissioner of Insurance for the Commonwealth of Virginia, to serve as the Deputy Receiver for Fidelity Bankers ("Deputy Receiver"). Alfred Gross succeeded Mr. Foster as Commissioner of Insurance and was substituted as Deputy Receiver for Fidelity Bankers.

On October 28, 2002, Robert Weingarten, Gerry R. Ginsberg, and Leonard Gubar ("Petitioners") filed a petition ("Petition") seeking payment of interest on their administrative claim. The Petitioners seek an order from the Commission requiring the Deputy Receiver to pay the sum of $263,913.25 in interest on the $3.5 million stipulated judgment entered by the United States District Court for the Eastern District of Virginia on January 19, 2001. The Petitioners are former directors of Fidelity Bankers.

After extensive federal litigation, the Petitioners and the Deputy Receiver agreed to settle the Petitioners' claim for indemnification by the entry of a "Stipulated Judgment" in the Petitioners' favor in the amount of $3.5 million. The Stipulated Judgment was entered by the United States District Court for the Eastern District of Virginia on January 19, 2001. A provision of the Stipulated Judgment provided that the payment of $3.5 million to Petitioners was "subject to the determination of the Virginia State Corporation Commission as to the priority to be accorded this judgment among the claims against, and liability of, the Receivership Estate."

After further litigation at the Commission and the Supreme Court of Virginia,[2] it was established that the $3.5 million judgment in favor of the Petitioners is entitled to be paid as an expense of the administration of the estate pursuant to § 38.2-1509 of the Code of Virginia. This Petition, seeking payment of interest from January 19, 2001, to August 7, 2002,[3] followed.

Petitioners claim that they are due interest on the Stipulated Judgment because the Stipulated Judgment Order does not exclude the accrual of post-judgment interest. Accordingly, Petitioners maintain that 28 U.S.C. § 1961 requires that interest be paid on the Stipulated Judgment.

The Deputy Receiver filed a Motion to Dismiss and Answer to Petition for Payment of Interest, as well as an accompanying memorandum in support thereof, on November 15, 2002. The Deputy Receiver denies that any interest is due to be paid to the Petitioners. The Deputy Receiver further asserts that the Petition should be dismissed because (i) as a matter of law, the Petitioners are not entitled to payment of post-judgment interest on the Stipulated Judgment;

---

[1] References herein to Fidelity Bankers include First Dominion Mutual Life Insurance Company, the successor of Fidelity Bankers Life Insurance Company, and the Fidelity Bankers Life Insurance Company Trust.

[2] See Weingarten v. Gross, 264 Va. 243 (2002).

[3] The Stipulated Judgment was entered by the United States District Court for the Eastern District of Virginia on January 19, 2001, and the Petitioners received payment of the $3.5 million (without any accompanying interest) from the Deputy Receiver on August 6, 2002.

(ii) the Petition is untimely and was filed with the Commission in violation of the requirements set forth in the Receivership Appeal Procedure ("RAP"); (iii) the Petitioners have waived their rights to any post-judgment interest on the Stipulated Judgment; and (iv) § 12.1-36 of the Code of Virginia only permits payment of interest on Commission judgments when specifically allowed by the Commission. Since the Commission Order of July 31, 2002, directed payment only of the $3.5 million, the Deputy Receiver argues, no interest is due or permitted under Virginia law.

The Petitioners filed a memorandum in opposition to the Deputy Receiver's Motion to Dismiss on December 2, 2002.[4] Therein, the Petitioners renew their contention that they are owed interest in the amount of $263,913.25 from the Deputy Receiver. The Petitioners again assert that payment of interest on a judgment entered by a federal court is mandatory, pursuant to 28 U.S.C. § 1961. The Petitioners further assert that the RAP is not applicable to the current Petition, primarily because the Commission previously ruled that the Petitioners' claim for payment of the $3.5 million itself was not subject to the RAP.[5] The Petitioners further assert that they have not waived their right to interest on the Stipulated Judgment as the Petitioners claim that they acted promptly to demand interest once the issue of priority was determined. The Petitioners also claim that they received no consideration from the Deputy Receiver in exchange for waiving their right to interest. The Petitioners also reject the Deputy Receiver's contention that interest could not have accrued until July 31, 2002.

The Deputy Receiver filed a Reply in Support of Motion to Dismiss Petition for Payment of Interest on December 16, 2002. The Deputy Receiver argues again that, as a matter of law,

---

[4] The Petitioners filed a corrected Memorandum in Opposition to the Motion to Dismiss on December 4, 2002.

[5] Petition of Robert Weingarten, Gerry R. Ginsberg and Leonard Gubar, Case No. INS-2001-00062, Final Order, 2001 S.C.C. Ann. Rep. 105 (August 8, 2001). Petitioners also claim that they are not a "creditor" as that term is used in the RAP, since it has already been determined that the Stipulated Judgment is an administrative expense of the estate, not a claim of a general creditor.

post-judgment interest does not accrue on the Stipulated Judgment. The Deputy Receiver further contends that the Petitioners have waived any right that they may have had to interest on the Stipulated Judgment, that Virginia law does not provide for payment of interest on judgments of the Commission unless expressly allowed by the Commission, and that the Petitioners failed to comply with the RAP, rendering their Petition untimely.

Pursuant to the agreement reached between the Petitioners and the Deputy Receiver, Judge Williams of the United States District Court for the Eastern District of Virginia ordered "[t]hat [Petitioners] recover of [the Deputy Receiver], the sum of $3.5 million, representing certain of the fees and costs incurred by [Petitioners] in the present action, such recovery to be made only from the assets of the Fidelity Bankers Life Insurance Company Receivership Estate and subject to the determination of the Virginia State Corporation Commission as to the priority to be accorded this judgment among the claims against, and liability of, the Receivership Estate." The Stipulated Judgment clearly contemplated additional action by the Petitioners and the Deputy Receiver before payment of the $3.5 million. The Stipulated Judgment required the Commission to determine the priority to be accorded the $3.5 million as a condition precedent to payment by the Deputy Receiver. The Commission directed payment of the $3.5 million as an expense of the administration of the estate under § 38.2-1509 of the Code of Virginia together with the costs taxed to the Deputy Receiver in an Order entered on July 31, 2002.[6] No provision for interest was made in the Order.

In accordance with our previous ruling in this case,[7] we find that the RAP is inapplicable to the present proceeding. We have reviewed the pertinent cases cited by both parties. Because

[6] See, Petition of Robert Weingarten, Gerry R. Ginsberg, and Leonard Gubar, Case No. INS-2001-00062, Order, July 31, 2002, at 2. The Supreme Court mandate issued on June 7, 2002, also provided that "[the Petitioners] shall recover from the [Deputy Receiver] . . . costs . . ." in the amount of $1,309.20.

[7] Petition of Robert Weingarten, Gerry R. Ginsberg and Leonard Gubar, Case No. INS-2001-00062, Final Order, 2001 S.C.C. Ann. Rep. 105 (August 8, 2001), *rev'd*, Weingartern v. Gross, 264 Va. 243 (2002).

of our determination that the Petitioners are not entitled to interest under either Virginia or federal law, we do not address the Deputy Receiver's contention that the Petitioners have waived their right to assert a claim to interest on the Stipulated Judgment.

Neither the Commission's Order entered on August 8, 2001,[8] nor the Commission's Order entered on July 31, 2002,[9] addressed the issue of whether interest was to be paid on the Stipulated Judgment. Nor did the Petitioners seek interest in those proceedings. Section 12.1-36 of the Code of Virginia provides that "[t]he judgments of the Commission for fines or penalties, *or for the recovery of money*, shall take effect as of the date thereof, *and when allowed by the Commission, the judgment shall bear interest from that date.*" (Emphasis added.) The Commission is without authority to reopen its July 31, 2002, Order and award interest in this case.[10] We note also that 28 U.S.C. § 1961 provides, in pertinent part that "[e]xecution [for the interest] may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State." Since the Commission did not allow interest on the judgment referenced in its Order dated July 31, 2002, no execution may be levied for any interest on that judgment. Even if § 12.1-36 of the Code of Virginia is not applicable, the Petitioners are not entitled to interest on the Stipulated Judgment under federal law.

Assuming, as both the Petitioners and the Deputy Receiver have in this case, that federal law rather than state law governs the Stipulated Judgment, the payment of interest is still not warranted. Section 1961 of Title 28 of the United States Code provides, *inter alia*, that

---

[8] Petition of Robert Weingarten, Gerry R. Ginsberg and Leonard Gubar, Case No. INS-2001-00062, Final Order, 2001 S.C.C. Ann. Rep. 105 (August 8, 2001), *rev'd*, Weingarten v. Gross, 264 Va. 243 (2002).

[9] Petition of Robert Weingarten, Gerry R. Ginsberg, and Leonard Gubar, Case No. INS-2001-00062, Order, July 31, 2002.

[10] The Commission derives all its powers from the Constitution and statute laws of the state. Jeffries v. Commonwealth, 121 Va. 425, 442 (1917).

"[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." We do not believe that the money in this case was "recovered in a district court." First, while the Stipulated Judgment was filed and entered in the United States District Court for the Eastern District of Virginia, the money was recovered at the *Commission*, following litigation over the priority to which the $3.5 million was entitled to be paid. The Stipulated Judgment itself specifically included the provision that the Commission must first determine the priority to be accorded the judgment before it would be paid. Moreover, we find that the cases submitted by the parties do not support the Petitioners' contention that the $3.5 million was "recovered in a district court" even if the Stipulated Judgment is interpreted according to federal law.

Kincade v. General Tire & Rubber Co.[11] involved a class action alleging plantwide racial discrimination at a tire and rubber plant in Waco, Texas. A proposed settlement agreement was filed with the court. After subsequent appeals by disaffected class members were resolved, the plaintiffs filed their request for interest on the court-approved settlement agreement. The Court noted that "the plaintiffs [had] failed to cite a single case in which § 1961 has been applied to a court order or judgment which merely approves a settlement agreement arrived at by the parties to a lawsuit."[12] After determining that the question was one of first impression, the Court held that "§ 1961 is intended to allow postjudgment interest on money awarded by a judge or jury after litigation. Thus, the Court holds that § 1961 was not intended to apply and will not be interpreted to extend to court-approved settlement agreements."[13] Similarly, in the instant case, the Petitioners and the Deputy Receiver have agreed to a Stipulated Judgment.

---

[11] 540 F. Supp. 115 (W.D. Tex. 1982), *rev'd on other grounds*, 716 F.2d 319 (5th Cir. 1983). The Fifth Circuit reversed the District Court on its interpretation of the settlement agreement. The Fifth Circuit did not address the District Court's interpretation of 28 U.S.C. § 1961.

[12] 540 F. Supp. at 120.

[13] Id. at 121.

Subsequent cases have cited Kincade with approval and have reached the same result. In Isaiah v. City of New York,[14] a stipulated settlement was ordered by the Court, by which the plaintiff was to receive a certain amount of money. The plaintiff later sought interest on that amount. The Court held that 28 U.S.C. § 1961 only applies to "money judgments" that are "recovered in a district court" and found that in the case of a court-approved settlement agreement, the amount of money to be paid is not "recovered in a district court."[15]

Similarly, Doyle v. Turner[16] involved litigation between former officers of a labor union and the union. Certain portions of the dispute were resolved by a Stipulated Order of Dismissal. A subsequent claim for interest was denied by the Court, which found that 28 U.S.C. § 1961 does not apply to amounts owing under a stipulation of settlement or consent judgment.[17] We find the reasoning of Kincade, Isaiah, and Doyle to be persuasive.[18] The Petitioners and the Deputy Receiver reached a compromise on the Petitioners' counterclaims in the federal litigation, and their agreement was enshrined in the Stipulated Judgment. We find that the $3.5 million was not "recovered in a district court" as that term is used in 28 U.S.C. § 1961 based on the foregoing cases.

While Petitioners cite Waggoner v. R. McGray, Inc.[19] in support of their position, we are not persuaded by the decision in that case. It is true that Waggoner involved a stipulated judgment, and the Ninth Circuit held that, under 28 U.S.C. § 1961, interest is paid on a judgment

---

[14] 1999 U.S. Dist. Lexis 841 (S.D.N.Y. 1999).

[15] Id. at 2.

[16] 2001 U.S. Dist. Lexis 7645 (S.D.N.Y. 2001).

[17] Id. at 7-8.

[18] See also, Audiovisual Publishers, Inc. v. Cenco, Inc., 964 F. Supp. 861, 880, n.24 (S.D.N.Y. 1997) ("mandatory postjudgment interest under 28 U.S.C. § 1961 is not applicable here because the Consent Judgment does not constitute an award of money by the court after litigation of a lawsuit").

(stipulated or not) regardless of whether the judgment expressly includes it.[20] Waggoner relied on two cases in support of its decision, neither of which stands for the proposition ultimately reached by the Ninth Circuit.

Blair v. Durham[21] is one of the cases cited by the Ninth Circuit in Waggoner. Blair does not support the Waggoner decision because the Blair case involved a jury verdict, not a stipulated judgment or settlement agreement approved by the court. The Sixth Circuit had no occasion to address the question of whether the successful litigants would be entitled to interest on a judgment if it had been reached by agreement, rather than awarded by a jury.

Schumacher v. Leterman[22] also involved a controversy over whether the defendants were required to pay interest on an amount owed to the plaintiff. The initial case was resolved by agreement but contained a provision for subsequent action if the defendants failed to make payments in accordance with the earlier agreement. The plaintiff obtained a judgment after the defendants failed to make a payment and the plaintiff filed a motion for an order declaring the defendants in default. The case is therefore distinguishable. In any event, the Southern District of New York no longer follows Schumacher, as evidenced by the decisions in Doyle and Isaiah. We believe that Waggoner is not supported by the decisions in Blair and Schumacher. Moreover, we find the reasoning of Kincade, Isaiah, and Doyle to be more convincing, especially given the procedural posture of this case.

The parties expressly reserved to this Commission the determination of the priority to be accorded the $3.5 million payment. If the Commission's determination that the Petitioners were

---

[19] 743 F.2d 643 (9th Cir. 1984).

[20] 743 F.2d at 644.

[21] 139 F.2d 260 (6th Cir. 1943).

[22] 14 F. Supp. 1015 (S.D.N.Y. 1936).

entitled only to the status of unsecured creditors had been affirmed by the Supreme Court of Virginia, the Petitioners might not have received payment for years, until all others with priority to the assets of the estate had been satisfied. We do not believe that the $3.5 million Stipulated Judgment would be accruing interest until such time as the other creditors had been satisfied. The Petitioners' position would have dictated just such a result. We hold, therefore, that the Petitioners are not entitled to any interest on the $3.5 million Stipulated Judgment.

ACCORDINGLY, IT IS ORDERED THAT:

(1) The Petitioners' request for $263,913.25 be, and the same is hereby, DENIED.

(2) The papers herein shall be placed in the file for ended causes.